

No. 87-1132

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IN THE

Supreme Court of the United States

October Term, 1987

THE TOLEDO TRUST COMPANY, AS TRUSTEE OF TRUST
NO. 4118 AND THE TOLEDO TRUST COMPANY,
AS TRUSTEE OF TRUST NO. 4117,
Petitioners,

vs.

SANTA BARBARA FOUNDATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

PETITIONER TRUST NO. 4118's REPLY BRIEF

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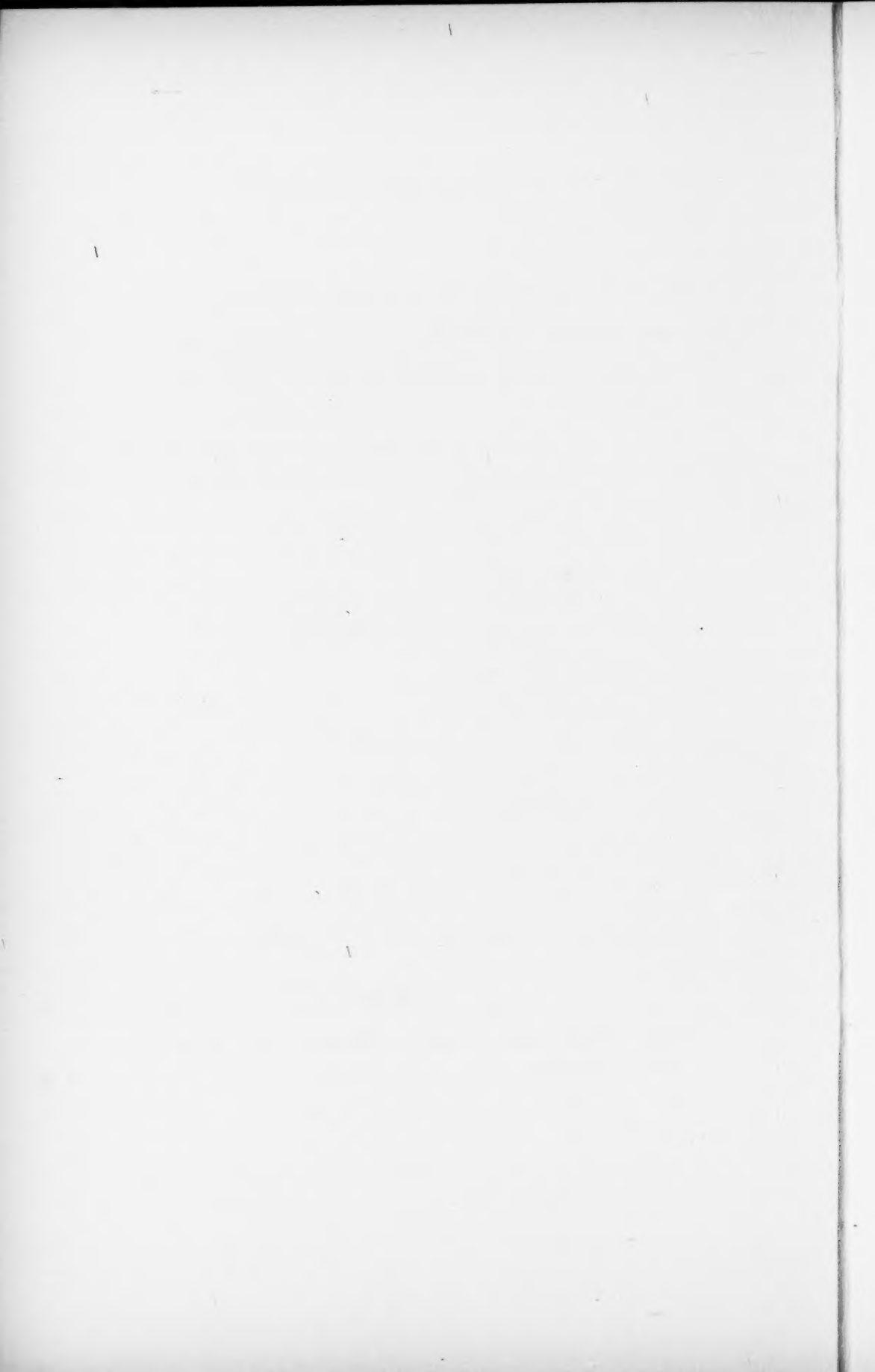


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**THE TOLEDO TRUST COMPANY, AS TRUSTEE
OF TRUST NO. 4118 AND THE TOLEDO
TRUST COMPANY, AS TRUSTEE OF
TRUST NO. 4117,**

Petitioners,

vs.

**SANTA BARBARA FOUNDATION,
*Respondent.***

**ON PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT**

**PETITIONER TRUST NO. 4118's
REPLY BRIEF**

Contrary to Respondent's assertion, Petitioner's federal due process rights were first denied by the Ohio Supreme Court at the ultimate stage of the proceedings below. That order could not have been anticipated because Respondent had expressly disclaimed any intention of raising the issue decided. Thus, by joining in

the motion for rehearing, this Petitioner invoked its federal constitutional claim at the "earliest opportunity for raising it," *Herndon v. Georgia*, 295 U.S. 441, 444 (1935); and despite the Ohio Supreme Court's denial of the motion without opinion, that claim was sufficiently and timely raised. *Missouri v. Gehner*, 281 U.S. 276, 320 (1930); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-8 (1930).

Here the question of "effective exercise" of the special power of appointment required construction of both the instrument of grant (the Ohio trust agreement) and the instrument of exercise (the California will). Before the Ohio courts, all that Respondent claimed as to the "full faith and credit" effect of the California court's order was that it is conclusive as to *will* construction. Summarizing that claim in its reply brief on the merits in the Ohio Supreme Court, Respondent said:

"The California proceedings did not purport to exercise jurisdiction over the trust assets, the trustee or the takers in default, nor did it [sic] attempt to construe or interpret the trust instrument." (Suppl. A5).

But, in view of the declination by Alcoholics Anonymous, and despite the judicial substitution of Respondent, the Ohio trial court perceived the "threshold issue" to be whether the donee of the power had "... fail[ed] effectively to exercise the power of appointment granted to her ..." within the meaning of these words of the *trust* agreement, and the court of appeals affirmed. Neither lower court found Respondent's full faith and credit argument relevant, much less dispositive.

In Ohio Supreme Court practice, the appellant is required to frame issues on appeal as "proposition[s] of law which the appellant claims is applicable to the facts in the case and which, if he prevails, could serve as a syllabus." (Ohio Supreme Court Rules of Practice, Rule V(1)(D), Suppl. A1). But the Respondent's "propositions" in its Ohio Supreme Court brief neither raised nor even mentioned the California order (Suppl. A3).

The Ohio Supreme Court's order in this case thus came as a surprise to the parties, *none* of whom had contended that the California order was decisive as to all questions affecting entitlement to the trust assets—decisive, that is, as to trust as well as will construction, and binding on parties who had not appeared in California, and over whom, as Respondent had conceded, the California court "did not purport to exercise jurisdiction."

Petitioner Trustee of Trust No. 4117 then filed a motion for rehearing (Respondent's A16), seeking clarification as to whether the Ohio Supreme Court had indeed meant to award the trust assets to Respondent by giving the California order "full faith and credit" effect as to all entitlement questions.* Joining in that motion, Petitioner herein noted that the decisive effect the Ohio Supreme Court apparently had given the California order had not been a matter of "genuine contention," and was "squarely at odds with the constitutional principles of due process and full faith and

* The Ohio Supreme Court subsequently acted to dispel any doubt about that meaning. The common pleas court's November 19, 1987 order on remand (A30), directing distribution of the assets to the Respondent, was entered in response to a peremptory writ of mandamus which the Ohio Supreme Court had issued at the Respondent's instance.

credit announced by the United States Supreme Court in *Hanson v. Denckla* . . ." This Petitioner then proceeded in its memorandum to argue those principles, essentially as it has done here (Respondent's A20-25). Thus, it can not seriously be maintained that this Petitioner failed to raise the constitutional issue at the earliest opportunity below.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

**SUPREME COURT [OF OHIO] RULES
RULES OF PRACTICE**

* * * * *

RULE V. BRIEFS ON MERITS IN APPEAL CASES

Section 1. Appellant's Brief

* * * * *

The appellant's brief must comply with Rule VI and contain.

* * * * *

(D) An argument, which shall be headed by the proposition of the law which the appellant contends is applicable to the facts in the case and which, if he prevails, could serve as a syllabus. See paragraph three of the syllabus of *Drake v. Bucher*, Supt. (1966), 5 Ohio St.2d 37, 213 N.E.2d 182. If several propositions of law are contended for, the argument shall be divided by utilizing each proposition as a subheading.

A2

**BRIEF OF APPELLANT SANTA BARBARA
FOUNDATION FILED IN THE SUPREME
COURT OF OHIO (EXCERPT)**

No. 86-1064

IN THE SUPREME COURT OF OHIO

THE TOLEDO TRUST COMPANY, AS
TRUSTEE OF TRUST NO. 4117,

Appellee,

vs.

SANTA BARBARA FOUNDATION,

Appellant,

and

THE TOLEDO TRUST COMPANY AS
TRUSTEE OF TRUST NO. 4118,

AND NANCY S. JONES,

Appellees.

Appeal from the Judgment of the Court
of Appeals of Lucas County, Ohio
Sixth Appellate District

**BRIEF OF APPELLANT SANTA
BARBARA FOUNDATION**

* * * * *

Proposition of Law No. 1:

The declination of appointive assets by a designated appointee does not render the exercise of a testamentary special power of appointment ineffective.

* * * * *

Proposition of Law No. 2:

Equitable principles may be applied to give effect to an attempted exercise of a testamentary special power of appointment where the donee of such power expresses an intent to execute the power by will and designates various charitable institutions as appointees [*Wills v. Union Savings & Trust* (1982), 69 Ohio St. 2d 382, affirmed].

A4

**REPLY BRIEF OF APPELLANT SANTA
BARBARA FOUNDATION FILED IN THE
SUPREME COURT OF OHIO (EXCERPT)**

No. 86-1064

IN THE SUPREME COURT OF OHIO

THE TOLEDO TRUST COMPANY, AS
TRUSTEE OF TRUST NO. 4117,

Appellee,

vs.

SANTA BARBARA FOUNDATION,

Appellant,

and

THE TOLEDO TRUST COMPANY AS
TRUSTEE OF TRUST NO. 4118,

AND NANCY S. JONES,

Appellees.

Appeal from the Judgment of the Court
of Appeals of Lucas County, Ohio
Sixth Appellate District

**REPLY BRIEF OF APPELLANT
SANTA BARBARA FOUNDATION**

* * * * *

For the same reason that the judgment of the
Michigan court [in *Toledo Trust Co. v. National Bank of
Detroit*, 50 Ohio App. 2d 147 (1976)] as to the

guardianship itself was entitled to full faith and credit in *Toledo Trust*, the order of the California court in this instant action is likewise entitled to full faith and credit. The California proceedings did not purport to exercise jurisdiction over the trust assets, the trustee or the takers in default, nor did it attempt to construe or interpret the trust instrument. As has been previously stated, the California action was a construction action conducted to ascertain the intention of a California domiciliary, for which action California was the only proper forum. [p. 12]

* * * * *